



## **State & Federal Contractors Water Agency**

*1121 L Street, Suite 802, Sacramento, CA 95814*

September 21, 2010

Delta Stewardship Council  
650 Capitol Mall, 5<sup>th</sup> Floor  
Sacramento, CA 95814

Re: Administrative Procedures and BDCP Standards of Review

Dear Chairman Isenberg and Council Members:

We appreciate the staff presenting options to the Council for discussion under Item 8 for your meeting on September 23, 2010. However, we request the Council also consider the language we offered in our September 15 letter (attached) as an alternative, since the SFCWA-proposed language most closely comports with the law regarding appeal of administrative agency determinations and is consistent with the intent of the Delta Reform Act to provide an opportunity for a review of the DFG certification to ensure its reasonableness.

Should the Council decide to choose from the options provided by staff, then we urge the Council to adopt Option 3 for Paragraph 23 because that alternative specifically recognizes that the appeal should be handled "based on applicable law", including substantial evidence review on the record before the Department of Fish and Game. We believe it would be appropriate to add to Option 3 the following language proposed by your staff in its Option 2 to ensure the highest level of understanding and communication between the Council and DFG should an appeal occur: "The council may seek clarification from the department of its reasoning and factual findings prior to the council making its final decision."

We remain opposed to the allowance in Paragraph 18 for Council members or the Executive Officer to appeal the DFG BDCP certifications to the Council. As an appellate body, the Council is supposed to be "above the fray" so to speak and the allowance for self-appeal is inconsistent with that status and the adjudicative detachment required to exercise impartial judgment. Instead of including language providing such an allowance, that language should be replaced with language precluding an appeal from Council members or Council staff.

We also believe that Section 23.5(b) as proposed is contrary to applicable law as it appears to authorize "any" new evidence by "testimony," specifically adding that this new evidence need not be limited by the record before the Department of Fish and Game. This "evidence" and "materials" shall become part of the hearing record even though it appears that minimal, or none, of the rules relating to evidence and

### *Directors*

**James M. Beck**  
*Kern County Water  
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**Jeff Kightlinger**  
*Metropolitan Water  
District of Southern  
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**Bill Harrison**  
**Dan Nelson**  
**Jason Peltier**  
*San Luis & Delta-  
Mendota Water  
Authority*

**Beau Goldie**  
*Santa Clara Valley  
Water District*

**Steve Robbins**  
**Jill Duerig**  
*State Water Project  
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Authority*

**Tom Birmingham**  
*Westlands Water  
District*

witnesses will apply to this new information. Section 23.5(b) should be deleted or significantly revised to reflect the applicable law with respect to review of administrative agency decisions.

Paragraph 19(c) should be stricken as well. The proposed language provides for a joint hearing to satisfy 85320(d) and (e). This is inappropriate. The hearings contemplated in those two sections are not compatible with being combined. A hearing "concerning the incorporation of the BDCP into the Delta Plan" is inapposite with a hearing considering an "appeal" of DFG's "determination that the BDCP has met the requirements" of the Act. The former is an administrative function that will need to focus on the effective melding of the BDCP with the Delta Plan, while the latter is a quasi-judicial activity that has nothing to do with the Delta Plan per se. Paragraph 19(c) should be deleted.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "BMB", with a long, sweeping horizontal line extending to the right.

BMB  
Executive Director